

TITLE 327 WATER POLLUTION CONTROL BOARD

#00-136(WPCB)

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from February 1, 2002 through March 2, 2002 for submission of comments on IDEM's draft rule language. IDEM received comments from the following parties:

Brownsburg Waste Water Treatment Plant (BWWTP)

Gary Sanitary District (GSD)

Improving Kids' Environment, represented by Tom Neltner (IKE)

Indiana Association of Cities and Towns (IACT)

Kendallville Utilities (KU)

Mishawaka Utilities (MU)

Following is a summary of the comments received and IDEM's responses thereto:

Comment: It appears that IDEM is once again redefining what water pollution control facilities do by determining with this draft rule that these facilities are water polluting facilities. (KU)

Response: Senate Enrolled Act (SEA) 431, now known as Public Law 140-2000, was passed by the 2000 General Assembly and contains SECTION 23 which specifically requires the Water Pollution Control Board to adopt a rule requiring National Pollutant Discharge Elimination System (NPDES) permit holders to give notification whenever information from any reliable source indicates that a CSO is discharging or may discharge within the next twenty-four (24) hours.

Comment: The CSO Public Notification rule will put an additional burden on CSO communities that are already having to comply with federal regulations requiring development of a public education program regarding the potential for combined sewer overflows (CSO). Treatment plant operators have been putting a tremendous amount of time and effort toward maximizing flows through their treatment facilities, but, under this draft rule, that effort toward maximizing flow to the treatment plant could be diminished so that notification phone calls can be made. (BWWTP)

Response: The draft rule at 327 IAC 5-2.1-4(b)(5) requires a CSO community's CSO notification procedure to assign responsibility within the community for implementing the CSO notification procedure but does not require the assignment to be made to treatment plant personnel.

Comment: People need to use common sense. Sewers have been discharging to our receiving streams for over eighty (80) years, and, by this time, people should be knowledgeable about this problem. The requirement of a twenty-four (24) hour notice every time there is a chance for rain will be a tremendous economic burden to communities. It would make more sense to educate everyone with a single public announcement once each year that provides the information that a combined sewer overflow could occur with any chance of rain at any time during the year. (BWWTP)

Response: The conditions in the draft rule concerning when and under what circumstances notification must be made were taken directly from Public Law 140-2000, SECTION 23, as written by the Indiana General Assembly in the 2000 legislative session.

Comment: "Community notification", the term used in Senate Enrolled Act 431 (now known as Public Law 140-2000), is distinct from the individual notification that is emphasized in the draft rule. Impacts to water quality from combined sewer overflows are triggered by the obvious occurrence of rainfall, and the most effective way to protect the community is to educate it. Basic public education regarding bacteria counts in certain streams after rain should be the goal. Other typical safety and health hazards in municipalities do not require individual notification. Trying to make notifications based on

prediction or at the actual time of occurrence will be wasteful of resources and will not serve the community good. (IACT, MU)

Response: Public Law 140-2000, SECTION 23 does not deal with other typical safety and health hazards but with the requirement that the Water Pollution Control Board must adopt a rule to require NPDES permit holders to give notification whenever information from any reliable source indicates that a CSO is discharging or may discharge within the next twenty-four (24) hours.

Comment: If the goal of the draft rule is to protect the public, the message quite simply is, “When it rains, bacteria go up. When it might rain, bacteria might go up.”. This simple message could be ingrained in the community consciousness through public service announcements, billboards, bill enclosures, warning signs, public meetings, and the like. The draft rule’s extensive notification burden is not sufficiently supported by comparative health risk data and will place undue burden and liability on communities. (IACT)

Response: The Indiana General Assembly in the 2000 legislative session directed the Water Pollution Control Board to adopt a rule providing for community notification under specified conditions. IDEM’s understanding of community notification does not include a prohibition on notification being made to individuals. However, the individuals required to be notified by the draft rule should not be extensive or burdensome. An early version of the draft rule presented to the workgroup did focus on a generalized, community-wide, education program with the use of public service announcements, billboards, bill enclosures, warning signs, and the like. That rule version met with great opposition from community representatives on the workgroup. The draft rule produced through the workgroup process includes an approach that adheres to Public Law 140-2000, SECTION 23 and is complementary to federal provisions that require CSO communities to give the public adequate notification of CSO occurrences and CSO impacts.

Comment: Mishawaka has submitted a version of the draft rule with changes that in general achieve the following: (1) Substitute community education for individual notification made to affected persons; (2) Rename the “CSO notification procedure” in section 4 as a “CSO notification program”; (3) Limit notification to the recreation season and to be given to private property owners adjacent to the receiving water and within one thousand (1,000) feet of a combined sewer overflow outfall only if the private property owner requests notification; (4) Eliminate the CSO community’s requirement to document a private property owner’s refusal to accept the community’s offer to post a warning sign; and (5) Eliminate the rule language taken from Public Law 140-2000, SECTION 23 concerning when and under what conditions notification must be made. (MU)

Response: Mishawaka is thanked for its submission of rule modifications; however, the draft rule has been through a several months workgroup review process prior to being published for a second public comment period. It is not possible to eliminate any requirements the General Assembly placed on the Water Pollution Control Board for adopting a rule concerning CSO notification. IDEM does not believe that individual notifications, where they are required in the draft rule, are outside the meaning of the community notification term used in SEA 431. The legislative mandate for this rulemaking does not state that the requirement to provide notification applies only during the recreational season.

Comment: Do rules exist for providing community notification or notifying persons who would most likely be affected by non-point source pollution? (KU)

Response: No.

Comment: The draft rule only addresses risks from water borne pathogens associated with actual combined sewer overflows rather than also considering the contamination from any significant precipitation resulting in storm water run-off which can also cause or contribute to a violation of

Indiana's recreational water quality standard of two hundred thirty-five (235) colonies per liter. It can be assumed that the pathogens in storm water run-off are not of human origin, but health and environmental professionals have all concluded that nonanthropogenic water borne pathogens pose a similar health risk as those of human origin. Despite this knowledge that waterbodies receiving substantial amounts of storm water run-off pose the same health risk as those that receive CSO discharge, IDEM is not making any effort to require anyone to be notified of the health risks from recreating in or on waterbodies recently contacted by storm water discharges. Likewise, the draft rule also ignores sanitary sewer overflows (SSO) which indisputably have the potential to contain an even greater concentration of anthropogenic pathogens than combined sewer overflows. As a result, the notification required by the draft rule would, by implication, falsely assure that there is no risk in coming into contact with rain affected waters that have received discharges from storm water run-off or sanitary sewer overflows. The draft rule should be modified to provide a much more protective message that there are potential health risks from coming into contact with any waterbody that has recently been affected by a substantial wet weather event. For example, the message could state the following: "If it rains more than a half inch, stay out of the water for forty-eight (48) hours.". In addition, any CSO, sanitary sewer overflow, and storm water outfall should have a sign posted with the appropriate warning about staying away from them when they are flowing, and a community should be required to provide appropriate, separate public notice each time there is a dry weather CSO or sanitary sewer overflow. (GSD)

Response: Dry weather discharging from a CSO or a SSO is a violation of NPDES permit conditions. Rule 13 addresses storm water run-off. As required by Public Law 140-2000, SECTION 23, the draft rule requires CSO communities to educate the public, by way of providing notification, about the risk of coming into contact with waters impacted by CSO discharges. However, CSO communities are free to be more comprehensive and educate the public about risks associated with other sources of pollutants.

Comment: Applying the requirements of the rule to every CSO discharge in every community is excessive, can mislead the public, and can create unnecessary expenses for the community. Instead of such universal application of the rule, there should be an established threshold based on the contamination content of the CSO discharge that must be exceeded before the requirements of the rule are triggered. A CSO containing a very diluted sewage component due to an extremely high rainwater volume or a high volume stream may have negligible health risk. One of Mr. Neltner's first notice comments printed in the Indiana Register with the draft rule at second notice of comment period states that, "People need to be notified about the magnitude of the CSO problem because the higher the level of contamination the more severe is the hazard.". Conversely, the lower the level of contamination the less severe is the hazard. Therefore, this rule should simply not apply to all CSOs. (IACT)

Response: IDEM believes that including such a threshold would not comply with the provisions of Public Law 140-2000, SECTION 23 which requires notification "whenever information from any reliable source indicates that: (1) a discharge or discharges from one or more combined sewer overflow points is occurring; or (2) there is a reasonable likelihood that a discharge or discharges from one or more combined sewer overflow points will occur within the next twenty-four (24) hours.".

Comment: The draft rule actually increases the odds that someone will get sick from coming into contact with contaminated water because the required notification does not focus on storm water run-off or sanitary sewer overflow in addition to combined sewer overflow. A community may not be held liable for illness or injuries for not providing any notice of the hazards of coming into contact with rain contaminated water but will be held liable for harms resulting from unreasonably deficient notices. If this rule is adopted with its requirement for insufficiently protective notification, then it also needs to

contain language stating that IDEM and the state will defend and indemnify any community that uses the language required by the rule. (GSD)

Response: As required by Public Law 140-2000, SECTION 23, the draft rule requires CSO communities to educate the public, by way of providing notification, about the risk of coming into contact with waters impacted by CSO discharges. However, CSO communities are free to be more comprehensive and educate the public about risks associated with other sources of pollutants.

Comment: The draft rule needs to include an exemption for CSO communities to protect them from any liability associated with individuals who choose to enter CSO receiving streams but claim they were not notified. Any reports provided to IDEM by a CSO community regarding notification should serve as proof that a good faith effort was made on behalf of the CSO community to notify citizens of health issues related to CSO. (IACT)

Response: The Water Pollution Control Board does not have the authority to provide any such protection from liability to CSO communities.

Comment: The City of Kendallville has been aggressively separating sewer systems over the past forty (40) years, has submitted its CSO Operation Plan with long term strategy, and has reached the level that Indiana's CSO Strategy has defined as attainable. For these reasons, Kendallville is opposed to the CSO Public Notification rule. However, one revision to the draft rule could be an expansion on the requirement for posting warning signs. Signs should be posted every one-eighth (C) mile downstream to the community's corporate limit rather than just one (1) sign posted at the combined sewer overflow outfall. (KU)

Response: Public Law 140-200, SECTION 23, passed by the Indiana General Assembly, requires every CSO community to provide public notification as specified by the draft rule. If a community ceases to have combined sewer overflows then it would not be affected by this rule. The CSO Public Notification rule states minimum requirements that CSO communities must meet. The rule does not prohibit a community from providing additional notification with warning signs posted at regularly spaced intervals.

Comment: The definitions of "combined sewage", "combined sewer system" and "wet weather event" should be removed from the rule because the terms are not used anywhere in the rule other than in the definitions. As well, the definition of "combined sewage" differs from the statutory definition. (IKE)

Response: While it is most normal to include definitions only for terms used in a rule, the meanings of combined sewage and a combined sewer system are essential to understanding the meaning of a combined sewer overflow community and combined sewer overflow outfall and do serve a purpose in this rule. The definition of "combined sewage" is taken directly from the statutory definition and has the same meaning; the only difference is that the references made in the statutory definition to other statutory definitions have been omitted causing no difference in the meaning of "combined sewage". The definition of "wet weather event" will be eliminated from the rule.

Comment: Several references to "CSO points" should be changed to "CSO outfalls" for sake of consistency, and the term should be defined. (IKE)

Response: "CSO outfall" is defined at 327 IAC 5-2.1-3(5) and will be used consistently throughout the rule in replacement of "CSO point".

Comment: An undefined term, "CSO impacted waterbody", is used at 327 IAC 5-2.1-4(b)(4). This term should be defined as follows: "Combined sewer overflow impacted waterbody" or "CSO impacted waterbody" means waters of the state that exceed the water quality standards due to a combined sewer overflow without regard to other sources of pollution. (IKE)

Response: A definition of "affected water" has been added to the draft rule at 327 IAC 5-2.1-

3(2), and revisions to section 4 and other sections of the draft rule have been made in response to this comment.

Comment: A length of time longer than the four (4) months allowed by 327 IAC 5-2.1-4(c)(2) would be appreciated for submission and implementation of the CSO community's CSO notification procedure. (BWWTP)

Response: A rule normally takes a minimum of four (4) months to become effective after it is final adopted by the board. Four (4) months beyond the effective date of the rule would provide the CSO communities eight (8) months from the time of the rule's final adoption to complete and submit their CSO notification procedures.

Comment: Section 4 or an additional section needs to include a requirement that the CSO notification procedure be included in the CSO communities' CSO operational plans and in the Long Term Control Plans. (IKE)

Response: A new subdivision has been added to the draft rule at 327 IAC 5-2.1-4(c) to require the CSO notification procedure to be included in a community's CSO operational plan.

Comment: The "affected persons" listed at 327 IAC 5-2.1-5(a)(1), who are to be among the intended recipients of notification, need to be limited to those who live within a five (5) mile radius of the CSO outfall. If there is no reasonable limit placed on who must be notified, then prisoners, people living in foreign countries, all members of a national environmental group, etc., may request and be required to receive notification. This would present a CSO community with a crippling administrative burden. (IACT)

Response: A definition of "affected persons" has been added to the draft rule in section 3. Each CSO community will determine the extent of the affected persons requiring notification. This will be accomplished, in part, through use of the data the CSO community has collected to determine the extent of in-stream impacts caused by its CSO discharges. The collection of this information is a requirement of all CSO permittees; therefore, IDEM does not believe using this information to determine the extent of affected persons will present CSO communities with a crippling administrative burden.

Comment: "Drinking water supply companies" used in 327 IAC 5-2.1-5(a)(3) is not defined and implies that notice is only needed to be given to private businesses. The term should be replaced with "public water suppliers". (IKE)

Response: The intent of section 5 is to require CSO communities to provide notice to any supplier of drinking water, public and private, located within the specified range. The questioned term will be modified to "drinking water suppliers".

Comment: An introductory phrase stating "Unless specifically required in this rule," should be added at 327 IAC 5-2.1-5(c). Without such an addition to subsection (c), its current language contradicts 327 IAC 5-2.1-6(a)(1)(A)(ii)(BB) which requires documentation of refusal by a property owner or operator. As well, there could be other situations where a CSO community and the recipient of notification mutually could agree to confirmation of receipt of the notification, and the rule should not prevent that possibility. (IKE)

Response: The suggested introductory phrase has been added at 327 IAC 5-2.1-5(c).

Comment: In 327 IAC 5-2.1-6(a)(1), the terms "recreation" and "downstream" should be much more clearly defined or replaced with more appropriate language that relates to a realistic public health threat from contact with combined sewer discharge waters. The area determined in section 6(a)(1) needs further clarification such as the following: "In areas where there is a reasonable likelihood that full body contact will occur at this location during or after a wet weather event and such likelihood is based upon sworn testimony that voluntary, full body contact with the water has been observed on at

least two (2) occasions during any given recreational season.”. While requiring testimony may seem excessive, it is not prudent to utilize tax payer and ratepayer dollars to fund any activity based only upon assumption such as the draft rule does concerning areas having recreation. Additionally, the notification requirements of section 6 should be limited to the recreational season because disinfection is not a requirement of publicly owned treatment works outside of the recreational season based, in part, upon the reasonable conclusion that recreation is not occurring. (IACT)

Response: A recreation season limitation was considered during the workgroup process and rejected because nothing in Public Law 140-2000, SECTION 23 limits the notification requirement to a portion of the year. It is certainly an observable and frequent occurrence to find boating, swimming, and fishing activities ongoing in times of the year outside the recreational season so to limit the rule’s applicability to the recreational season would be to limit its effectiveness in achieving its intent as established by the legislature. As well, recreational activities in the water may occur that do not involve full body contact; therefore, IDEM does not believe the language suggested by the comment would be appropriate. Section 6 of the draft rule has been revised to improve its clarity. The revision does not use the terms “recreation” and “downstream”.

Comment: The language “sewage pollution” and “sewage may be in this water” used in the required warning sign to be posted according to 327 IAC 5-2.1-6(a)(1)(A)(i)(BB) is objectionable because, though it is arguably accurate language, it closely resembles and, therefore, subtly supports and helps perpetuate the misrepresentation of other, inaccurate terminology consistently used by some groups. Specifically, the term “raw sewage overflow” rather than the appropriate term “combined sewer overflow” is consistently used by some with the intent to rally public outrage. In order to accurately notify the public and to function within the proper public educational component of the CSO Long Term Control Plan, it is recommended that each place where the term “sewage” occurs on signage it should be replaced with the following: “rainwater combined with sewage”. Furthermore, it would be sufficient that warning signs simply state that the public not swim, wade, or ingest the water in an appropriate effort to prohibit full body contact. (IACT)

Response: It was felt by IDEM and the workgroup that the language “sewage pollution” and “sewage may be in this water” used in the required warning sign is accurate and more understandable to the general public.

Comment: The language of 327 IAC 5-2.1-6(a)(1)(A)(ii) is awkward and needs to make clear that a CSO community is responsible for asking to post a sign each year and document refusals. (IKE)

Response: Section 6 of the draft rule has been revised to improve its clarity.

Comment: In 327 IAC 5-2.1-6(a)(2)(A), the language “within one (1) mile” should be replaced with “within ten (10) miles”. The Indiana spill reporting rule acknowledges that ten (10) miles is a reasonable distance for determining the potential impact of spills to a flowing stream. The CSO Public Notification rule should also use the ten (10) mile distance because CSO contamination is often equally or more hazardous than spills. A less acceptable alternative to extending the distance to ten (10) miles would be to modify 327 IAC 5-2.1-6(a)(2)(B) to allow all affected persons to be on the registry-notification list even if such persons do not receive an invitation. (IKE)

Response: The idea of unlimited requests to receive notification through the invitation and registry option was discussed during the workgroup meetings held on the draft rule, and it was decided that a distance limitation was needed in order to prevent the rule requirements from becoming ever increasingly costly to the CSO communities that have to provide the notifications. The legislative goal in directing the Water Pollution Control Board to adopt this rule was to protect human health, and the workgroup reasoned that residents in close proximity of a CSO outfall most need notification as

opposed to persons who may be interested in CSO occurrences but normally do not live within the affected area. However, IDEM recognizes that any distance limitation may be arbitrary due to the variation of impacts in the different CSO waters. Therefore, the draft rule has been revised to require notice to the media, providers of public access or recreational opportunities, and those who are most likely to come into contact with the contaminated water. This will include residents adjacent to CSO outfalls and those who live downstream of the outfall to such distance that the water is still potentially affected by the CSO discharge.